84-1238

No.....

Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

—o—

RAYMOND R. ROOP,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

—o—

JOHN MARSTON RICHARD
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QUESTIONS PRESENTED FOR REVIEW

Alaska Statute 28.35.032 makes it a criminal offense, punishable by fine and manadatory imprisonment for a motorist to refuse a breath test. The following questions concerning the constitutionality of the above statute are presented here for review:

(1) Whether a breathalyzer test is a consentual warrantless search under the Fourth Amendment; and if so, may the state impose mandatory imprisonment upon a motorist who peacefully refuses consent?

(2) Does the imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a breath test violate a person's right to equal protection under the laws guaranteed by the Fourteenth Amendment, by creating a special class of citizens who are not protected by the Fourth Amendment?

(3) Does the imposition of criminal penalties upon a motorist for his peaceful refusal to submit to a search of his body impose an unconstitutional condition upon the exercise of his Fourth Amendment rights, contrary to the Equal Protection clause of the Fourteenth Amendment?

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NO._____

In The

SUPREME COURT OF THE UNITED STATES

February Term, 1985

RAYMOND R. ROOP

Petitioner,

vs.

STATE OF ALASKA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF ALASKA

OPINIONS BELOW

The Opinion of the Alaska Court of Appeals, affirming Mr. Raymond Roop's conviction for refusing to take a breathalyzer test, was issued on September 19, 1984. [See, Appendix "A"].

Because this opinion was a "Summary Disposition" pursuant to Alaska Appellate Rule 214, no publication of this opinion occurred. The Alaska Supreme Court ORDER denying Mr. Roop's PETITION FOR HEARING was issued on November 14, 1984. The ORDER has not been officially reported and is attached as Appendix "B".

JURISDICTIONAL STATEMENT

On March 8, 1984, Raymond Roop entered a nolo contendere plea to the charge of Refusing to Submit to a Chemical Test of Breath, a violation of AS 28.35.032(A). With the approval of the trial court and the State, Mr. Roop reserved his right to appeal his earlier filed and rejected constitutional challenges to the statute's validity. [See, Oveson v. Anchorage, 574 P.2d 801 (Alaska 1978) and Cooksey v. State, 524 P.2d 1251 (Alaska 1974) authorizing this procedure].

Judgment was entered on March 8, 1984. (Appendix "C"). A timely appeal was perfected to

the Alaska Court of Appeals which affirmed the conviction on September 19, 1984. (Appendix "A"). Mr. Roop's Petition for Hearing was denied by the Alaska Supreme Court on November 14, 1984. (Appendix "B").

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALASKA STATUTES

Alaska Statute 28.35.032: Refusal to Submit to Chemical Test. (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresidence privilege to drive, that the refusal may be used against the person in a civil or

criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AS 28.35.035.

Alaska Statute 28.35.035: Administration of Chemical Tests Without Consent. (a) If a person is under arrest for the crime of driving while intoxicated and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.35.031 and a chemical test may be administered to determine the amount

of alcohol in that person's breath or blood.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

1. TRIAL.

On October 1, 1983, Petitioner was stopped while driving a motor vehicle by an Alaska State Trooper. Petitioner, Mr. Roop was then taken to the Trooper Station where he was warned of the State's implied consent law and its sanctions of up to one year in jail, a $5,000 fine and license revocation for refusing to submit to a breath test. Petitioner was then asked to perform a breath test, but he peacefully refused. He was charged with drunk driving and refusing to submit to a chemical test.

B. HOW THE FEDERAL QUESTIONS WERE RAISED.

1. TRIAL

The constitutional questions presented here were first raised in Mr. Roop's December 20, 1983, MOTION TO DISMISS, which argued that Alaska

Statute 28.35.032 was unconstitutional on its face and as applied. Mr. Roop's Fourth and Fourteenth Amendment arguments were explained at pages 2 through 17 of his December 20, MEMORANDUM OF LAW supporting the motion. The trial court denied the motion in an ORDER dated February 8, 1984. (This ORDER was issued orally on the record.) On February 21, 1984, Mr. Roop filed a MOTION FOR RECONSIDERATION of the Court's denial of his MOTION TO DISMISS and that MOTION FOR RECONSIDERATION was denied on March 7, 1984.

The State of Alaska then dismissed the Driving While Intoxicated Count and Mr. Roop plead nolo contendere to Refusing to Submit to a Chemical Test on March 8, 1984. Pursuant to a procedure authorized by Cooksey v. State, 524 P.2d 1251 (Alaska 1974), Mr. Roop preserved his challenges to the constitutionality of the statute under which he was convicted. He later perfected a timely appeal to the Alaska Court of Appeals.

2. ALASKA COURT OF APPEALS.

Mr. Roop fully presented his Fourth and Fourteenth Amendment claim in his May 18, 1984, BRIEF to the Alaska Court of Appeals at pages 2 through 13. The Fourteenth Amendment issues were presented at pages 12 and 13 of same brief.

The Alaska Court of Appeals rejected Mr. Roop's arguments in a summary disposition [Pursuant to Alaska Appellate Rule 214, and the Guidelines for Publication of Court of Appeals Decisions, (Court of Appeals Order No. 3)] on September 19, 1984. (See, Appendix "A".)

3. ALASKA SUPREME COURT.

Mr. Roop raised his Fourth and Fourteenth Amendment arguments in a PETITION FOR HEARING to the Alaska Supreme Court on October 5, 1984. His Fourth Amendment argument appeared at pages 5 - 8 of the PETITION; his Fourteen Amendment arguments appeared at page 8 through 11 of the PETITION. The PETITION was summarily denied without Opinion on November 14, 1984. (Appendix "B").

REASONS FOR GRANTING THE WRIT

A. IT IS UNCONSTITUTIONAL TO CRIMINALIZE THE ASSERTION OF FOURTH AMENDMENT RIGHTS.

1. A Breathalyzer Test is a Warrantless Search Under the Fourth Amendment.

The Fourth Amendment protects persons from unreasonable searches and seizures. The rule is well settled that warrantless searches are per se unresaonable, subject only to a few specific and well delineated exceptions. Mincey v. Arizona, 437 U.S. 385, 390 (1978).

The Fourth Amendment warrant requirement and its sharply limited exceptions apply with equal force to intrusions of the human body as to buildings and other private places. Schmerber v. California, 384 U.S. 737, 770 (1966). Cf. Ybarra v. Illinois, 444 U.S. 85 (1979), reh. den. 444 U.S. 1049 (1980). Accordingly, the taking of a breath sample from a motorist is a search and seizure protected by the Fourth Amendment. Schmerber at 737; State v. Locke, 418 A.2d 843, 846-47 (R.I. 1980).

There was no warrant obtained in this case. The only exception to the warrant requirement that might have applied was the "consent" exception recognized in Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

2. A Breathalyzer Test Requires Consent and Is Not A Search Incident to Arrest.

The Alaska Court of Appeals characterizes a breath test as a search incident to arrest, Burnett v. Municipality of Anchorage, 678 P.2d 1364, 1368 (Alaska App. 1984).

In order to successfully measure blood alcohol content, the breathalyzer requires alveolar air exhaled from deep within the lungs. R. Erwin, Defense of Drunken Driving Cases, Section 10-7 (1984). If the test subject exhales short, shallow, or even "normal" breaths, the breath test is ineffective.

Since one cannot be physically compelled to produce alveolar air, it can be obtained by a police officer only with the actual consent and

voluntary cooperation of the motorist.

In contrast to a "consent" search, a "search incident to arrest" depends not on the voluntary cooperation of the suspect, but on the power of the State to search and seize at will whether the accused chooses to cooperate or not. See, e.g., United States v. Rico, 594 F.2d 320 (2d Cir. 1979).

Some chemical tests are searches incident to arrest, as was the blood test in Schmerber v. California, 384 U.S. 757 (1966). In that case, the search incident to arrest occurred when the defendant's blood was forceably extracted after the defendant had refused to provide a breath sample. Id. at 758, 765, n.9. A Schmerber-type search cannot be performed in Alaska, because AS 28.35.032 provides that, except under limited circumstances not present here, no chemical test can be administered if the suspect refuses to consent to a breath test. Thus, the Alaska legislature has deliberately foreclosed the power

of law enforcement agents to seize from an unwilling motorist physical evidence of his blood alcohol level.

3. "Consent" Gained by Threat Of Imprisonment Is Not Voluntary.

Mr. Roop's case specifically raises the question whether local government has the right to force a motorist to "consent" to a search of his body through the threat of a mandatory jail sentence. For consent to be valid, it must be voluntary. See Schneckloth v. Bustamonte, 412 U.S. 218, 233-34 (1973); Bumper v. State of North Carolina, 391 U.S. 543, 548 (1968).

A corrollary to a true consent is the right of the suspect to peacefully refuse to grant it. Schneckloth at 227. To make the exercise of that right a criminal offense would inhibit the exercise of Fourth Amendment rights. Elson v. State, 659 P.2d 1195 (Alaska 1983). See also, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

"Consent" obtained by threat of imprisonment

and the chilling of Fourth Amendment rights cannot be voluntary.

4. The Statute is a General Warrant Law And Violates The Fourth Amendment On Its Face.

By means of AS 28.35.032, the State of Alaska, by legislative fiat, forces Alaskan motorists to consent to warrantless searches and seizures. The statute requires that a motorist be imprisoned if he asserts his Fourth Amendment right to peacefully refuse consent to a warrantless search. As such, the statute constitutes a "general warrant" law.

General warrants have long been abhorrent to American notions of personal liberty and the existence of such warrants under English law served as the primary impetus for the inclusion of the Fourth Amendment in the Bill of Rights. See Henry v. United States, 361 U.S. 98, 100-01 (1959).

AS 28.35.032, as with any general warrant law, violates the Fourth Amendment on its face and

should have been stricken by the state courts.

B. THE IMPOSITION OF CRIMINAL PENALTIES FOR THE PEACEFUL REFUSAL TO SUBMIT TO A BREATH TEST CREATES A SPECIAL CLASS OF CITIZENS UNPROTECTED BY THE FOURTH AMENDMENT.

AS 28.35.032 creates a distinct class of defendants who must pay for their assertions of Fourth Amendment rights with the loss of the fundamental right to liberty. All other Alaskan criminal defendants retain their Fourth Amendment right to peacefully withhold consent to a search without a loss of liberty. Elson v. State, 659 P.2d 1195 (Alaska 1983).

The theory underlying the equal protection clause of the Fourteenth Amendment is that all persons similarly situated must be treated alike as to privileges, liabilities and burdens. Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 461-62 (1937).

1. The Right to Liberty And To Peacefully Refuse Consent To A Warrantless Search Are Fundamental.

A citizen's personal liberty is a fundamental and natural right. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). Likewise, the right to be free from unreasonable searches and seizures under the Fourth Amendment is fundamental. Gouled v. United States, 255 U.S. 298, 303-04 (1921). See also, Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). One of the acknowledged rights under the Fourth Amendment is the right to peacefully refuse consent to a warrantless search. Schneckloth v. Bustamonte, 412 U.S. 218, 231-33 (1973).

2. The State Statute Cannot Satisfy The Strict Scrutiny Tests of "Compelling State Interest" and "Least Drastic Alternative."

AS 28.35.032 denies Alaskan motorists of their fundamental rights by either forcing them to

forfeit their right to refuse consent to a search or by taking away their liberty if they assert that right.

When a statute impinges upon fundamental freedoms, the State must satisfy the "strick scrutiny" test by demonstrating a compelling state interest and the absence of less drastic alternatives to accomplish its purpose. San Antonio School District v. Rodriguez, 411 U.S. 1, 34, reh. den. 422 U.S. 959 (1973). Neither prong of the test can be met here.

The purpose of AS 28.35.032 is stated by the Alaska Supreme Court in Lundquist v. Dept. of Public Safety, 674 P.2d 780 (Alaska 1983), as follows:

> [T]his statute is merely an internal operating procedure that provides a sanction for those persons who refuse to submit to the test. This sanction is nothing more than a non-violent means of compelling submission to a test that provides evidence of intoxication.

Id. at 785.

According to Lundquist, the purpose of the

statute is to simplify the police officer's task in gathering evidence in drunk driving cases. Such a purpose can always be asserted when government chooses to obtain evidence by means of a legislated general warrant. However, when the purpose of the law is to by-pass protections guaranteed by the Fourth Amendment, certainly that purpose cannot be legitimate or compelling.

Even assuming, arguendo, that coercing a waiver of constitutional rights by threat of imprisonment is a legitimate and compelling state interest, legislative enactments impinging fundamental rights must still be narrowly drawn to accomplish only the compelling state interest at stake. The least drastic means of achieving the governmental purpose must be used and infringement on constitutional rights kept to the barest minimum. Zablocki v. Redhail, 434 U.S. 374 (1978); Roe v. Wade, 410 U.S. 113 (1973).

Revoking the driver's license (loss of a privilege) or requiring a mandatory blood test of

a motorist who refuses a breath test are less drastic and constitutional means of accomplishing the government's aim of securing evidence rather than coercing "consent" to a search by threats of imprisonment. See, e.g., Schmerber v. California, 384 U.S. 757 (1966).

Other states have tailored their implied consent statutes to avoid unnecessary encroachment on their citizen's fundamental rights of personal liberty and against unreasonable searches and seizures. Those states have enacted constitutional methods of either revoking an uncooperative motorist's driver's license or authorizing forced blood extraction as permitted in Schmerber. See, e.g., Va. Code Section 18.2-265 (Supp. 1983) (license revocation lasting up to six months); Wisc. Stat. Ann. Section 343.305 (West 1971) (nonconsentual blood extraction).

C. PENALIZING THE REFUSAL TO SUBMIT TO A BREATHALYZER TEST BY IMPRISONMENT PLACES AN UNCONSTITUTIONAL CONDITION ON THE IMPLIED CONSENT STATUTE.

The doctrine of unconstitutional conditions provides that government may not grant a benefit or privilege upon conditions requiring the recipient to relinquish his constitutional rights. Simmons v. United States, 390 U.S. 377 (1968). In Alaska, pursuant to the statute challenged here, a motorist's personal liberty is conditioned upon the waiver of Fourth Amendment rights.

Historically, this Court has correctly refused to permit criminal prosecutions based upon a defendant's failure to waive the right to peacefully withhold consent to a warrantless search. In Camara v. Municipal Court, 387 U.S. 523 (1967), the petitioner had been charged with refusing to permit building inspectors to search his house without a warrant. He challenged the constitutionality of the statute which criminalized his conduct. On appeal, this Court held that the petitioner had a constitutional

right to insist upon a warrant, and that he could not be constitutionally convicted for refusing to consent to the search. Id. at 942. See also, See v. City of Seattle, 387 U.S. 541 (1967).

If a criminal prosecution for refusing to waive Fourth Amendment rights is impermissible where the object of the search is a building, the same result should occur when the search is of a person. In either situation, the government has attached an unconstitutional condition to the exercise of Fourth Amendment Rights. As Mr. Justice Stewart stated in United States v. Jackson, 390 U.S. 570 (1968):

> If the provision [has] no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

Id. at 581-82. See also Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

The State statute challenged here forces Alaskan motorists to waive their Fourth Amendment rights in order to maintain their personal

liberty. To condition one's right to liberty in this manner is, in the words of Justice Stewart, "patently unconstitutional".

CONCLUSION

Condoning the statute challenged here will open the door for state legislatures to enact similar general warrant laws in other contexts. If refusing consent to a breathalyzer test can be made a criminal offense, so can refusing consent to other types of searches.

For all of the reasons discussed above, Mr. Roop respectfully requests that his PETITION FOR WRIT OF CERTIORARI be granted.

Dated this ___ day of January, 1985, at Anchorage, Alaska.

JOHN MARSTON RICHARD
Attorney for Petitioner

By: /s/ John Marston Richard,
William F. Dewey,
Attorney

APPENDIX "A"

THE COURT OF APPEALS OF THE STATE OF ALASKA

RAYMOND R. ROOP, Appellant, vs. STATE OF ALASKA, Appellee.	)	File No. A-375 SUMMARY DISPOSITION* [No. 697 -- September 19, 1984]

Appeal from the District Court of the State of Alaska, Third Judicial District, Anchorage, Natalie K. Finn, Judge.

Appearances: Jack D. Clark, Anchorage, for Appellant. David C. Stewart, Assistant District Attorney, Victor C. Krumm, District Attorney, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, and Singleton, Judge. [Coats, Judge, not participating.]

Raymond R. Roop was convicted of violating AS 28.35.032 (refusal to take a chemical test). He appeals, challenging the

constitutionality of the statute on its face. We considered and rejected each of Roop's arguments in McCracken v. State, ____ P.2d ____, Op. No. 399 (Alaska App., August 31, 1984).

The judgment of the district court is AFFIRMED.

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*Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF ALASKA

RAYMOND R. ROOP, Appellant,	)	Supreme Court No. S-668
vs.	)	ORDER
STATE OF ALASKA, Appellee.	)	

Court of Appeals No. A-375
Trial Court No. 3ANS-83-6420 Cr.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices

On consideration of the petition for hearing lodged on October 5, 1984 and filed with leave of court on October 29, 1984, and the response to the petition filed on October 23, 1984,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at

Anchorage, Alaska on November 14, 1984.

CLERK OF THE SUPREME COURT

DAVID A. LAMPEN

ccs: Justices
Counsel
Court of Appeals Judges
The Honorable Natalie K. Finn
Appeals Deputy, Anchorage Trial Courts

APPENDIX "C"
IN THE DISTRICT COURT
FOR THE STATE OF ALASKA

(Filed in the Trial Courts
State of Alaska, Third District
March 8, 1984)

AT ANCHORAGE, AK.

(XX) STATE OF ALASKA

( ) MUNICIPALITY OF ANCHORAGE

vs.

RAYMOND R. ROOP

TYPED
JUDGMENT (COUNT II (TWO))
Case No. 3 AN S 83-6420 CR

DOB: 09-20-30 Date of Offense: 10-01-83 Statute or Ord. AS 28.35.032(a) ----------

Crime charged: REFUSAL TO SUBMIT TO CHEMICAL TEST ----------

Driver's License No. (for traffic cases only):

0309344 ALASKA ----------

PLEA: ( ) Not Guilty ( ) Guilty
(xxx) No Contest (Cooksie Plea)

TRIAL ( ) Court ( ) Jury

The defendant was found and adjudged:

( ) NOT GUILTY. IT IS ORDERER that the defendant is acquitted and discharged.

(XXX) GUILTY of the crime named above.

( ) GUILTY OF _____

Any appearance bond in this case is exonerated.

SENTENCE

( ) Imposition of sentence is suspended and defendant is placed on probation until _____, 19____.

(xx) Sentence is imposed as follows:

(xx) Defendant is fined $800.00 with $400.00 suspended. The unsuspended $400 is to be paid STAYED PENDING APPEAL.

(xx) Defendant is committed to the custody of the Commissioner of Health and Social Services to serve 60 days with 52 days suspended. The suspended 8 (days) (xxxx) are to be served STAYED PENDING APPEAL

( ) Defendant is ordered

(xx) Defendant is placed on probation until March 8, 1986.

(xx) Defendant's (xx) driver's ( ) _____ license or privilege to apply therefore is (xx) revoked ( ) suspended ( ) limited for ONE (1) (xxx) (year) and any such license is to be immediately surrendered to the court.

License Number: 0309344 ALASKA

A limited license is issued with the following limitations:

(xx) The conditions of defendant's probation are:

1) NO SIMILAR VIOLATIONS FOR TWO (2) YEARS.

2) COMPLY WITH RECOMMENDATIONS OF ALCOHOL SCREENING.

** IF APPEAL NOTICE FILED BY APRIL 9, 1984, SENTENCE STAYED PENDING OUTCOME. IT NO APPEAL FILED, THEN DEFENDANT MUST CONTACT LOY BOLT, ALCOHOL SCREENING AND TURN IN OPERATOR'S LICENSE BY APRIL 13, 1984. ATTORNEY CAN REQUEST TIME FOR FINE.

SEAL

/s/ Jackie Rhini
ACTING MAGISTRATE

NATALIE K. FINN
Type or print Judge's name

March 8, 1984

EFFECTIVE DATE:

I certify that on 3/16/84
copies of this form were sent to:

JAILS
PADA
DPS
DOC
ATTY CLARK
DATA
CLERK: _____

Office - Supreme Court, U S
FILED
MAR 21 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1238

RAYMOND R. ROOP

Petitioner,

vs.

STATE OF ALASKA

Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALASKA THIRD JUDICIAL DISTRICT

NORMAN C. GORSUCH
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STATE OF ALASKA

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JURISDICTION

Roop has properly invoked this Court's jurisdiction under 28 U.S.C. § 1257(3).

ISSUES PRESENTED FOR REVIEW

1. May a state require a motorist to submit to a chemical breath test for determining his blood alcohol level after the motorist has been lawfully arrested by a police officer for driving while intoxicated?

2. May a state penalize a defendant who has been lawfully arrested for drunk driving and then refuses to take a breath test?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV of the United States Constitution provides:

> Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Alaska Statute 28.35.031(a) provides:

> A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(g)(1) or who operates a watercraft as defined by AS 28.35.030(g)(2) shall be considered to have given consent to a chemical

test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated.

Alaska Statute 28.35.032(a) provides:

> If a person is under arrest for the crime of driving while intoxicated and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered

without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

STATEMENT OF THE CASE

At approximately 3:00 a.m. on October 1, 1983, an Alaska State Trooper observed Raymond Roop driving south on the Glenn Highway near Anchorage, Alaska. Trooper Goe noted that Roop's vehicle was weaving back and forth between the two southbound lanes of the Glenn Highway.

Trooper Goe stopped Roop's car, determined he was intoxicated, and arrested Roop for driving while intoxicated. AS 28.30.030. Roop was then taken to the Anchorage police station. There, pursuant to AS 28.30.031, he was asked to submit to an "intoximeter," a chemical breath test for measuring Roop's blood alcohol level. A standard warning form was read to Roop, informing him that sanctions, including loss of his driver's license, could be imposed for refusing to submit to the intoximeter. In addition, Roop was informed that refusal to submit to the intoximeter was a misdemeanor under Alaska law.

Despite these warnings, Roop refused to submit to the intoximeter. He consequently was charged, pursuant to Alaska Statute 28.35.032(a), with the misdemeanor offense of refusal to submit to a chemical breath test.

Roop moved to dismiss the complaint in the trial court, claiming that AS 28.35.032(a) was unconstitutional. Roop's motion was denied.

Roop ultimately pleaded nolo contendere to the charge on the condition that he be allowed to preserve his challenge to the constitutionality of AS 28.35.032(a). (This procedure is authorized by Cooksey v. State, 524 P.2d 1251 (Alaska 1974).) In his subsequent appeal to the Alaska court of appeals, Roop argued that it was unconstitutional for the state to criminalize his refusal to take a chemical breath test. Roop claimed:

1. A breath test is an unreasonable warrantless search;

2. If a breath test is a reasonable search under an "implied consent" theory, then the defendant must

have the right to peacefully withhold his consent to search;

3. It was therefore unconstitutional for the State of Alaska to impose criminal penalties for Roop's refusal to submit to a breath test, since the state was penalizing Roop's lawful assertion of his Fourth Amendment rights.

The Alaska court of appeals rejected all of Roop's arguments, relying on its prior decision in McCracken v. State, 685 P.2d 1275 (Alaska App. 1984). In McCracken, the court of appeals had addressed each of the constitutional arguments raised by Roop in his appeal. The court ruled in McCracken that, assuming a breath test is a "search", for Fourth Amendment purposes, the breath test is a reasonable search because it is a search incident to arrest. Under AS 28.35.031(a), no motorist need submit to a breath test unless he has first been lawfully arrested for driving while intoxicated. The court then ruled that, since a breath test is a search incident to arrest, a defendant has no Fourth Amendment right to refuse. It further

reasoned that since a motorist does not have a Fourth Amendment right to refuse a breath test, criminalizing the refusal to take a breath test does not penalize the motorist's assertion of Fourth Amendment rights. Finally, the Alaska court of appeals held that since the arrested motorist does not have a Fourth Amendment right to refuse the breath test, it follows that AS 28.35.032(a) does not condition the motorist's driving privilege on the requirement that he forfeit his Fourth Amendment rights. McCracken v. State, 685 P.2d at 1276-78.

Roop petitioned the Alaska supreme court for discretionary review of the decision of the court of appeals, relying on the same arguments he had raised to the court of appeals. The Alaska supreme court denied review, and Roop has now petitioned this Court for a writ of certiorari to review the decision of the Alaska court of appeals.

REASONS FOR DENYING THE WRIT

The police may require a defendant who has been arrested for driving while intoxicated to submit to a chemical breath test because, assuming arguendo that a chemical breath test is a search, it is a search incident to arrest.

A BREATH TEST IS A SEARCH INCIDENT TO ARREST

Alaska Statute 28.35.032(a) specifically provides that refusal to take a chemical breath test is a crime only if a motorist has been arrested for driving while intoxicated. Roop does not contest the fact that the state trooper had probable cause to arrest him for drunk driving, nor does he claim that his arrest was otherwise invalid. Under these circumstances, a breath test is a constitutionally permissible search for evidence of the crime of driving while intoxicated. Chimel v. California, 395 U.S. 752, 762 (1969).

Since a valid arrest is always a condition precedent to Alaska's requirement that a motorist submit to breathalyzer examination, the Fourth Amendment is not violated by such an examination. Indeed, Alaska law holds that if the motorist takes the breath test he does not lose his right to contest whether the officer had probable cause to arrest. If the defendant was illegally stopped or arrested, then his breath test results will be suppressed. Burnett v. Municipality of Anchorage, 678 P.2d 1364, 1370 (Alaska App. 1984).

Roop nevertheless argues that it is incorrect to characterize a breath test as a search incident to arrest because in order to conduct a scientifically valid test the police officer needs the cooperation of the motorist. (The motorist must blow somewhat forcefully into a tube.) Roop reasons that if a search cannot be effected without the cooperation of the arrestee, then the search is not a "search incident to arrest", but rather must be viewed as a "consensual search". Roop contends that

such a consensual search can only be justified if it fits within the guidelines of Schnekloth v. Bustamonte, 412 U.S. 218 (1973).

Roop's argument confuses the legal concept "consent" with the factual concept "cooperation" or "assent". Consent to search in the constitutional sense is only required where the person has a legal right to refuse. A legally arrested motorist has no Fourth Amendment right to refuse a breath test. Although a motorist may fail to cooperate when the arresting officer attempts to administer the breath test, the motorist's failure to cooperate does not create a legal right where it would otherwise not exist.

The instant case is analogous to federal cases where a defendant has refused to provide a handwriting exemplar upon a lawful state request. This Court has held that since the defendant has no right to withhold the exemplar, a defendant who refuses to provide a handwriting exemplar can be jailed for contempt of court. United States v. Mara, 410 U.S. 19 (1972). Similarly, an

arrested motorist like Roop has no right to refuse to take a breath test test, and he may be criminally penalized if he refuses to provide a sample of his breath for analysis.

Roop's assertion that criminalization of his refusal to take a breath test violates the equal protection clause of the United States Constitution, U.S. Const. Art. I, §14, rests on the premise that he has a Fourth Amendment right to refuse a breath test. Roop reasons that if he has a Fourth Amendment right to refuse a breath test, then he should be treated like all other citizens who lawfully assert their Fourth Amendment rights. Roop's argument fails because Roop did not have a Fourth Amendment right to refuse a breath test.

CONCLUSION

This Court should not issue a writ of certiorari in this case because it does not present any novel federal question of law. Each one of Roop's constitutional claims rests on an erroneous assumption that he had a Fourth Amendment right to refuse a breath test. Even assuming arguendo that a breath test is a search, it is a search incident to arrest.

RESPECTFULLY SUBMITTED this 21 day of March, 1985.

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